Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANKLIN HALE AND CAROLYN HALE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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March, 2005

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QUESTIONS PRESENTED FOR REVIEW

This Petition is filed on behalf of husband and wife Defendants convicted of violations of the Lacy Act, 16 USC 3372 and 3373

The conviction was in a jury trial, and the sentencing was done by the Trial Court after overruling Motion(s) for New Trial by Defendant.

The Questions Presented for review are:

I. On counts 1 and 3, the court's charge as to the required knowledge of the defendant was insufficient.

II. The district court erred by not charging the jury the provisions of 16 U.S.C. § 3373(2).

III. Count 1 as pleaded and charged does not allege a criminal offense.

IV. The indictment in counts 4, 5, 6 and 7 charging a violation of Title 16 U.S.C. § 3372(d)(2) and § 3373(d)(3)(a)(ii) and Title 18 U.S.C. § 2 fails to allege an essential element of the offense in violation of the 5th Amendment of the United States constitution.

V. The sentencing in this case violated the holdings of this Court In Blakely v Washington and U.S. v Booker in that the Court Considered relevant conduct evidence not found by the jury, including that from the dismissed Counts and sentenced Appellants to sentences he felt were mandated by the Federal Sentencing Guidelines

PARTIES TO THE PROCEEDING

The Caption of this Petition completely and precisely reflects all parties to the proceeding. There are no Corporate interests subject to disclosure.

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CITATION OF OPINION BELOW

The Opinions of the District Court are contained in the Joint Appendix of the Record before the Sixth Circuit Court of Appeals. The decision of the Sixth Circuit Court of Appeals, from which this Writ is Prayed, is Not Recommended for full text Publication and has been assigned the citation of 2004 Fed App 0319p (6th Cir.)

The Sixth Circuit decision is contained in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The decision of the Sixth Circuit Court of Appeals from which this review is requested was entered on October 22, 2004 . A Petition for Rehearing was timely requested, and that petition was denied on January 6, 2005.

This Court has Jurisdiction for this Petition under 28 USC 1254(1) and 28 USC 2101).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process and trial rights provisions of the Fifth and Sixth Amendments to the United States Constitution, which read as follows:

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law ...

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The parties will be referred to as they appeared below: that is Appellants Carolyn and Franklin Hale as "Defendants" or Hales and the Appellee United States as "Government" or USA. The hearings involved in this appeal are the trial of the case beginning on May 7, 2002 and the sentencing held on March 21, 2003. References to these hearing transcripts will be referred to as "TR", and references to the technical record will be referred to as "RE".

The Appellants have run and operated a paddlefish purchasing and re-selling business for several years, locating in Kentucky and in Savannah, Tennessee. Their business name is Royaloff Caviar.

The Hales, who are husband and wife, and two other individuals were indicted in a 10-Count Indictment. (RE 1, Indictment). Count 1 charged the Appellants with conspiracy to violate the Lacey Act in violation of Title 18 United States Code § 371. Counts 2 and 3 charged the Appellants with violations of the Lacey Act, Title 16 United States Code § 3372(a)(2)(A) and 3373(d)(1)(B) and Title 18 United States Code § 2. Counts 4 through 10 charge violations of the Lacey Act relative to false documents, Title 16 United States Code § 3372(a)(2)(A) and § 3373(d)(1)(B) and Title 18 United States Code § 2.

Prior to trial, on motion of the Government, Counts 8, 9 and 10 were dismissed. (RE 85, Order).

At the trial, a stipulation was introduced that several individuals would testify that they were located outside the state of Tennessee and operated wholesale and retail businesses selling paddlefish caviar from Royaloff Caviar located in Savannah, Tennessee, Chattanooga, Tennessee, and Morganville, Kentucky. (TR 5-7-02, The Court, pp. 176-177).

Steve Nifong, Chief of Law Enforcement for Tennessee Wildlife Resources Agency, introduced several proclamations passed by the Wildlife Resources Commission. Also, Tennessee Code Annotated § 72-206, Part A, which states:

> Before any person, firm, or corporation engages in the business of a wholesale fish dealer or wholesale mussel dealer, as defined in this subsection, such person, firm or corporation shall make application to the State Wildlife Resources Agency upon forms provided by it.

He then read the definition set forth of wholesale fish dealers which is:

> Wholesale fish dealer means any person in business of buying for the purpose of selling, canning, preserving, or process, or buying for the purpose of handling for shipment or sale fish or other edible aquatic life or products to

> retainers and/or hotels, restaurants or cafes, each separate place of business shall require a separate license paid in.

He was present during the execution of a search at the Hales' residence in Chattanooga, and observed they were operating a wholesale fish dealership there. (TR 5-7-02, Nifong, pp. 179-190). The statute did not specify that a wholesale fish dealer had to have a license. (TR 5-7-02, Nifong, pp. 192-221).

A stipulation was introduced that the Defendants purchased caviar from fishermen, processed caviar, sold and shipped caviar from their residence in Chattanooga, Tennessee, to buyers outside of Tennessee. (TR 5-7-02, The Court, p. 222).

Billy Wishard, of Oklahoma, had two convictions for illegal paddlefishing and testified for the government. After his first arrest, he obtained $14,000.00 for bail money from the Hales. After the State of Oklahoma was closed to further paddlefish harvesting by law, he sold eggs to the Hales from there prior to being arrested in Chattanooga. He traveled the interstate from Memphis to Chattanooga. He made several sales, all but two of which were in Kentucky where he tried to park his car so no one could see his license plate. He never told the Hales where he obtained the eggs. He received receipts in the name of Bill Deals. He used that name for tax purposes and did not know if the Hales knew Oklahoma was

closed. (TR 5-9-02, Wishard, pp. 636-646). He fished in Alabama, Tennessee and Oklahoma. (TR 5-9-02, Wishard, pp. 656-661).

Vernon Green, a Game Warden from Oklahoma, testified that the state was closed for paddlefish since 1991. He claimed he met the Hales at a symposium and advised Carolyn Hale that Oklahoma was closed. (TR 5-9-02, Green, pp. 663-672).

Craig Preston, a commercial fisherman in Kentucky, testified that he took caviar to Chattanooga and sold it on numerous occasions over a three (3) year period. The Hales sold caviar in Chattanooga. He lived with the Hales about one month and saw others bring caviar there. He fished with Byron Mann in the closed Wabash River, and sold eggs to the Hales. Their real names were used for records. (TR 5-9-02, Preston, pp. 674-683). He was present when Frank Hale bought illegally snagged paddlefish. (TR 5-9-02, Preston, pp. 690-692). The Hales were aware he fished in closed waters. Carolyn Hale would give him a ticket for the eggs. He heard her talk about using false names. He had an arrangement with Frank Hale over the raising of paddlefish. (TR 5-9-02, Preston, pp. 694-723); (TR 5-9-02, Craig Preston, pp. 726-731).

Yvonne Preston occasionally fished with her husband in closed waters and sold the eggs to the Hales in Chattanooga for four (4) or five (5) years. (TR 5-9-02, Yvonne Preston, 732-736). She stated they would use false names on the

documents. She kept a set of records of her husband's fishing. (TR 5-9-02, Yvonne Preston, pp. 739-750). She did not know if Carolyn Hale was putting the correct name on the documents or not. (TR 5-9-02, Yvonne Preston, pp. 754-757).

Dennis Defriese of Chattanooga, a commercial fisherman, sold eggs to Frank Hale and others. He had a conviction for violation of the Lacey Act in 1989. He went to Arkansas, fishing with Bill Wallace, but as he was not an Arkansas citizen, he lost his license, which Frank Hale knew. He used Bill Wallace's license and sold caviar under his name to Frank Hale. He told the Hales he had a license. The Hales provided money for him to process eggs in Arkansas. (TR 5-9-02, Dennis Defriese, pp. 759-771). He admitted to tape recording a meeting with his wife, Carolyn Hale and himself. (TR 5-9-02, Dennis Defriese, pp. 779-783) (TR 5-9-02, Dennis Defriese, pp. 789-793).

Janice Defriese testified that she was in Arkansas with her husband and introduced checks and faxes from Frank Hale used to buy caviar. The caviar was taken to Chattanooga. She has a check fraud conviction. (TR 5-9-02, Janice Defriese, pp. 795-807).

William Wallace, a Dunlap, Tennessee commercial fisherman, sold to Frank Hale in Kentucky, Arkansas and Tennessee. He sold eggs from Arkansas to Frank Hale in Arkansas and eggs from Tennessee in Chattanooga. Receipts were made in his correct name. He did not know Defriese

was using his name. (TR 5-9-02, William Wallace, pp. 809-815).

Molly Wallace testified she helped her husband and they sold eggs to the Hales in Chattanooga, Kentucky and Savannah. (TR 5-9-02, Molly Wallace, pp. 816-822).

James Mize had two burglary convictions and he was potentially facing Federal charges. Due to an internet advertisement, he went to the Hales' residence in Chattanooga and sold caviar. He gave the Hales a false name and was never asked for identification. This relationship began in 1997 and continued for approximately three (3) years. He told the Hales he was snagging fish, which was illegal. Carolyn Hale helped him get an Illinois commercial fishing license, but he never fished Illinois. He sold caviar to the Hales using the name Gene Davis. He only brought eggs and not whole fish. The Hales could not identify the eggs he brought as having been from snagging as opposed to a net. At first the Hales only knew him by the false name he gave them. It was his decision not to get a commercial fisherman's license. (TR 5-10-02, Mize, pp. 838-867) (TR 5-10-02, Mize, pp. 872-873).

Gary Runions of Townsville, Tennessee was a commercial fisherman and stated that between 1995 and 1999 he sold caviar caught in Tennessee to the Hales in Chattanooga. A few times he sold eggs in Kentucky. Frank or Carolyn Hale asked him to say he sold the eggs in Kentucky when he had not. He knew they were moving to

Kentucky and wanted all their sales to go through there. (TR 5-10-02, Gary Runions, pp. 875-884).

Mary Runions delivered eggs for her husband to Chattanooga, Tennessee and did not remember seeing Frank Hale. She introduced a document which said sold in Kentucky but she never sold to the Hales in Kentucky. (TR 5-10-02, Mary Runions, pp. 886-891).

Perry Chism, a commercial fisherman, previously convicted of a the Lacey Act, sold caviar to the Hales in Kentucky, where he saw Carolyn Hale write out a ticket and put someone else's name on it. (TR 5-10-02, Perry Chism, pp. 893-897).

Sylvia Chism delivered eggs to Chattanooga on two or three occasions, and used a false name, which the Hales were aware of. (TR 5-10-02, Sylvia Chism, pp. 899-908).

Jimmy Harris worked for Mr. Linsman, who bought and sold caviar and he delivered caviar on one occasion to Chattanooga, and one time to Kentucky. (TR 5-10-02, Harris, pp. 910-917).

Ricky Melson, a commercial fisherman who had entered a guilty plea for a violation of the Lacey Act, testified he sold eggs to the Hales in Chattanooga, Arkansas and Kentucky. He fished the closed season, processed the eggs, and sold them to Frank Hale, who knew they were caught during the closed season. (TR 5-10-02, Ricky Melson, pp. 919-927). Sometimes Carolyn Hale put false names on the paperwork for fish delivered in Kentucky. True and false

names were used on paperwork in Chattanooga. He introduced numerous documents. He had Illinois fishing license in the event he was stopped in Tennessee, as instructed by the Hales. (TR 5-10-02, Ricky Melson, pp. 928-947) (TR 5-10-02, Ricky Melson, pp. 948-952). His income tax return showed false amounts and he made up some names on the invoices which he did not report income from. He believed the Hales cheated him out of money. The Hales relocated to Savannah, Tennessee in 1999. He processed eggs and kept them until after the season opened. It was a practice to take other people's caviar to the buyers and sell it on their behalf. (TR 5-13-03, Ricky Melson, pp. 968-1063).

Barbara Turner went to Kentucky twice with Ricky Melson and sold caviar to Frank Hale and Carolyn Hale did the paperwork. The ticket had a false name. In early 1990, she went to Chattanooga and someone handed her a ticket to sign. (TR 5-13-02, Turner, pp. 1071-1076).

Patsy Cornelius saw Ricky and Anthony Melson between 1995 and 1999 processing eggs during the closed season. (TR 5-13-02, Cornelius, pp. 1077-1095).

Debbie Blackwelder observed Anthony and Ricky Melson putting their boats in during closed season. She only saw paddlefish in Ricky Melson's boat during the spring of 1999, and the season had opened on April 15th that year. (TR 5-13-02, Blackwelder, pp. 1096-1110).

Maudie Melson, between 1995 and 1999, saw Anthony and Ricky Melson go fishing during the closed season. (TR 5-13-02, Maudie Melson, pp1112-1132).

Shawn Karns, a Criminal Investigator for the State of Tennessee, testified concerning an undercover operation which he ran. He visited at Hales business in Kentucky, as well as Savannah, Tennessee. (A different court reporter was present, for this day of the trial, therefore a different page numbering system was used). (TR 5-14-02, Karns, pp. 3-10).

John Rayfield of the United States Fish and Wildlife Services was involved in the search in Savannah. The records show sales made inside and outside of the state of Tennessee from 1995 through 1999. (TR 5-14-02, Rayfield, pp. 10-13).

After presenting this evidence, the Government rested.

Sharon Grove and Jane Haggard testified concerning the Melson family relationships. (TR 5-14-02, Grove, pp. 68-79); (TR 5-14-02, Haggard, pp. 78-86).

Bobby Joe Hale, brother of Frank Hale, said he occasionally worked with the Hales in Chattanooga and Mr. Melson brought in coolers of eggs with different names on them. That these eggs were weighed and written up separately in the names of the individuals on the coolers. That other individuals brought in eggs in coolers with different fishermen's names on the coolers. (TR 5-14-02, Bobby Joe Hale, pp. 87-100).

Albert A. French, commercial fisherman with a partner named David White, sometimes signed David White's

name to the documents. It was not uncommon for fishermen to take other fishermen's eggs in to sale. (TR 5-14-02, French, pp. 100-110).

William Harris, commercial fisherman, stated he had sold some eggs. (TR 5-14-02, Harris, pp. 110-116).

James Robertson testified he sold caviar to the Hales and would take other fishermen's caviar to be sold at the same time. (TR 5-14-02, Robertson, pp. 116-126).

Frank Hale testified he has a home in Chattanooga and been in the caviar business for approximately 32 years. He was doing business as Royaloff Caviar, which was a sole proprietorship at his residence when he bought a farm in Kentucky and moved there. He testified about his hatchery and supplying fish in Kentucky and Savannah. (TR 5-14-02, Frank Hale, pp. 126-145). While operating in Kentucky, they would come home to Chattanooga in the summer when the season was over and there were situations where customers would call Chattanooga and drop off caviar in Chattanooga. He became aware in 1998 that Tennessee was giving out applications for caviar licenses. He made inquiries to various members of the Tennessee Wildlife Resources Association concerning the need for a license, but did not believe they needed one until approximately August of 1999, when Agent Todd faxed them information while they were in Kentucky. He never received an letter sent to them in Chattanooga in 1998, as they were in Kentucky. When his business moved to

Savannah, Tennessee, he filed an application with the state and bought a license.

It was a common practice for one fisherman to bring in the eggs of other fishermen and to collect on their behalf. Whoever brought in the caviar would sign the names of the other fishermen on the necessary invoices. In 1990, Hale and his attorneys developed a form having fishermen sign that the caviar came from legal waters. As fishermen could process and preserve their own caviar, they could keep it stored for months before they actually sold it. He did not know that Neil Defriese, Jr. did not have a licence. Other times he was present when Ricky Melson brought in caviar and he never had any reason to believe that his eggs were from closed waters or were out of season.

When individuals brought in large quantities of caviar, they would put on the invoice the initials of the person who actually delivered the caviar to their buying station. He testified about his income from 1995 until 1999. He did not obtain a list of the names of the commercial fishermen in a state and had no reason to obtain their license numbers. In 1998, a fisherman could sell caviar eggs without being a commercial fisherman. He talked to several members of the Tennessee Wildlife Resources Association, and had they told him what kind of license he would need.

Hale never told anyone to use a false name on a record nor did he hear Carolyn Hale tell anyone to do so. When Mr. Cartwright came to Chattanooga there was a discussion that

he could be in violation by not having a Tennessee license, but that he responded that he did not know he had to have a buyer's license in Tennessee. (TR 5-14-02, Frank Hale, pp. 152-212).

After this proof, The defense rested.

The Court charges the jury, and then after the jury spent some time deliberating without being able to reach a verdict, the Court gave an Allen charge. The jury returned with convictions of the Appellants as to Counts 1, 3, 4, 5, 6 and 7, with a verdict of not guilty as to Count 2. (RE 168, 169, 170, Minutes 3/21/03).

On March 21, 2003 Franklin Hale was sentenced to a term of 24 months, 3 years of supervised release, a $25,000.00 fine, and a $100.00 special assessment for each Count. Carolyn Hale was sentenced to a term of 21 months, a supervised release term of 3 years, a fine of $25,000.00, and a $100.00 special assessment for each Count. (RE 172, 173, Judgment).

A timely Notice of Appeal was filed for both Appellants. (RE 174, Appeal).

The Appellant were allowed to remain on bond pending this appeal. (RE 183, Motion for Release on Bond).

Notice of Appeal was timely filed to appeal the case to the Sixth Circuit Court of Appeals, and the case, after briefing and supplemental briefing was argued before a panel of the Sixth Circuit on July 24, 2004.

The decision of the Court of Appeals denying the appeal was filed on September 22, 2004. A timely Petition to Rehear was filed, and the ruling denying the Petition to Rehear was entered on January 6, 2005. The Petition and Order denying are contained in the Appendix to this Application.

BRIEF AND ARGUMENT

I. On counts 1 and 3, the court's charge as to the required knowledge of the defendant was insufficient.

II. The district court erred by not charging the jury the provisions of 16 U.S.C. § 3373(2).

III. Count 1 as pleaded and charged does not allege a criminal offense.

IV. The indictment in counts 4, 5, 6 and 7 charging a violation of Title 16 U.S.C. § 3372(d)(2) and § 3373(d)(3)(a)(ii) and Title 18 U.S.C. § 2 fails to allege an essential element of the offense in violation of the 5th Amendment of the United States constitution.

V. The sentencing in this case violated the holdings of this Court In Blakely v Washington and U.S. v Booker in that the

Court Considered relevant conduct evidence not found by the jury, including that from the dismissed Counts and sentenced Appellants to sentences he felt were mandated by the Federal Sentencing Guidelines

I. On counts 1 and 3, the court's charge as to the required knowledge of the defendant s was insufficient.

In defining knowingly, the Court instructed the jury as follows:

> "Knowingly" means to act voluntarily and deliberately rather than mistakenly or inadvertently.

This was the sole definition of the term used in the court's instruction relative to the conspiracy and the substantive violation of the Lacey Act. In this case, where a violation of the Lacey Act requires knowledge such that the Defendant knew his action was in violation of the law. (See S. Rep. No.123, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S. Code Cong. & Admin. News 1748, 1759), this charge was insufficient. As was set out in earlier drug and food stamp violation cases, the statute here does not simply prohibit an action, it prohibits an action with knowledge of its illegality. The question of Defendant's alleged illegal

activities should be based upon the additional requirement of scienter, or knowledge of the alleged illegality at the time the actions were taken. This itself acts as an element of the offence and should not be allowed to be eliminated. Here, the failure to require the proof of an element of the offence by the jury and for the jury to be specifically charged as to the element and proof required constituted Plain Error and has such a significant effect in this hotly contested case that there can be no real doubt that the failure to charge the element directly affected the jury's verdict.

In discussing the knowledge required for a conspiracy to violate subsection (d)(2) of the Act, the Ninth Circuit has stated:

> The Supreme Court has held in order to sustain a judgment of conviction on a charge of conspiracy to violate a Federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself. United States v. Feola, 420 U.S. 671 (1975)...[Our prior decision in] Karr [742 F.2d 493 (9th Cir. 1984)] comports with the rule in Feola in that it requires the same degree of intent for the conspiracy charge as is required by the underlying statute.

United States v. Thomas, 887 F.2d 1341 (9th Cir. 1989).

The Sixth Circuit, in discussing the knowledge requirements in United States v. Bryant, 716 F.2d 1091 (6th Cir. 1983), said:

> Nor is it unconstitutional by the fact that it, unlike many other Federal laws, requires of a person a knowledge of the underlying statutes.

Since the Court did not charge that the Government had to prove that the Hales had a knowledge of the underlying statutes and that the actions charges were illegal when done, it committed reversible error. The Court of Appeals, in failing to deal with the failure to prove scienter, tried to rely on the clear knowledge argument. While that may apply to car theft, there is no such easy analysis here.

II. The district court erred by not charging the jury the provisions of 16 U.S.C. § 3373(2).

Count One of the Indictment charged the Hales with conspiracy (Title 18 U.S.C. § 371) to violate Title 16 U.S.C. § 3372(a)(2)(A) and 16 U.S.C. § 3372(d)(2), generally referred to as the Lacey Act, while Count Three charged the Hales with a substantive violation of the Lacey Act, Title 16 U.S.C. § 3372(d)(2).

The Court instructed the jury on the felony offenses under the Lacey Act, which requires "actual knowledge" by the Defendants (see section I as to the Knowledge argument), but did not instruct the jury as to the lesser offense of 16 U.S.C. § 3373(2). This uncharged section is a misdemeanor offense and a lesser included offence of the felony sections, in that it requires proof that the Hales "in exercise of due care should know" that the wildlife was taken in violation of law. See United States v. Parker, 991 F.2d 1493 (9th Cir. 1993)(Court recognized 16 U.S.C. § 3373(2) as a lesser included offense; applied the "plain error" standard of review as to reverse the case because there was no request by defense counsel at trial); United States v. Leveque, 283 F.3d 1098 (9th Cir. 2002).

As 16 U.S.C. § 3373(2) is a lesser included offense, the critical question is whether the failure to give the jury instruction was highly prejudicial and whether there is a high probability that the error materially affected the verdict. Jackson v. Virginia, 443 U.S. 307, 319 (1969).

One of the factual and legal problems in the trial of this case trial focused upon the ambiguity of *Tennessee Code Annotated* § 70-2-206, the state law statute in effect at the time. Where, as here, the Federal statute is drawn to borrow or incorporate the state statute to provide and define the prohibited criminal behavior, the Federal statute takes the state statute as it is written; sometimes artfully, often not. By the language of the Tennessee statute that was "borrowed" ,

it was unclear whether or not it was necessary pursuant to that Code Section for the Hales to have a license or to simply have an application for license on file with the appropriate Tennessee Department to engage in the fish egg buying business. Thus, a major issue of the trial was whether the Government was required to prove the actual knowledge or scienter of the Defendants as to which interpretation of the statute was being used.

Because of the length of the jury deliberation, the Court determined that it was necessary to give the jury an "Allen" charge thereby making it readily apparent that this was a close issue. (TR 5-16-02, The Court, pp. 385-387). It should also be noted that since Title 18 U.S.C. § 371 provides that if the offense which is the object of the conspiracy is a misdemeanor, then the punishment shall not exceed the maximum punishment for the misdemeanor. Here the Appellants have been substantially prejudiced in sentencing by this issue as well. See United States v. Dale, 178 F.3d 429 (6th Cir. 1999)(for sentencing prejudice as to a conspiracy).

The failure to give the lesser included offense instruction to the jury was highly prejudicial, and it is easy to see that the error materially affected the verdict.

III. Count 1 as pleaded and charged does not allege a criminal offense.

Count 1 alleged a conspiracy to violate the Lacey Act with the underlying State offense being a violation of *Tennessee Code Annotated* § 70-2-206.

Under the Means and Methods of a Conspiracy relative to the underlying Code, the Indictment states:

> Franklin Hale and Carolyn Hale were not licensed as wholesale fish dealers as required by Tennessee Code Annotated...
> (Emphasis added).

The pertinent section of the Tennessee Code in effect at the time reads as follows:

> Before any person, firm or corporation engages in the business of a wholesale fish dealer or wholesale mussel dealer, as defined in this subsection, such person, firm or corporation shall make application to the State Wildlife Resources Agency upon the forms provided by it.

Although it is clear from the statute that an application was required, not a license, Barbara Carey, an accountant-custodian of records for the Tennessee Wildlife Resources

Agency, testified there was no license issued to Franklin Hale from 1995 until 1998. (TR 5-7-02, Carey, pp. 226-228). The Chief Law Enforcement Agent Steve Nifong testified that the statute does not specifically require a license. (TR 5-7-02, Nifong, p. 221). It is interesting to note the Assistant United States Attorney, in his closing arguments, stated that no license was required by the Tennessee statute. (TR 5-15-02, Grinalds, p. 309). Furthermore, the Government introduced no evidence relative to an application for a license. It would therefore appear that the Grand Jury only heard evidence that the Hales did not have a license, and did not receive any evidence relative to the application for a license.

As the indictment alleged two objects of the conspiracy, (to sale/receive wildlife in violation of state law and to make a false record of the wildlife sold), a reversal is required by this Court. Yates v. United States, 354 U.S. 298 (1957) (where one of the objects of the conspiracy is legally inadequate and there is a general verdict, the conviction must be reversed).

Appellants also specifically adopt the case citations and arguments set forth in Issue IV of this brief in that this misstatement of applicable Tennessee law violated their rights under the 5th Amendment. Provided the Grand Jury was advised that the Hales were not required to have a license, it is conceivable the Grand Jury would not have found probable cause.

IV. The indictment in counts 4, 5, 6 and 7 charging a violation of Title 16 U.S.C. § 3372(d)(2) and § 3373(d) 3)(a)(ii) and Title 18 U.S.C. § 2 fails to allege an essential element of the offense in violation of the 5th Amendment of the United States constitution.

Counts 4, 5, 6 and 7 of the Indictment state, in part:

> ...did knowingly make a false record in that the Defendants Franklin Hale and Carolyn Sue Hale prepared records falsifying the identity and address of the seller as...in violation of 16 U.S.C. § 3372(d)(2) and § 3373(d)(3)(A)(ii).[1]

16 U.S.C. § 3372(d)(2) reads as follows:

> (d) False labeling offenses.
> It is unlawful for any person to make or submit any false records account, or label for, or false identification of any fish, wildlife, or plant which has been, or is intended to be sold-

---

[1]Each count differs only as to the names of the seller and dates of the acts.

The Indictment did not allege that the false record, account or label was a false identification of fish, wildlife or plant, it failed to allege an essential element of the offense.[2]

In a Federal prosecution "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or a grand jury" alleging all of the elements of a crime. Constitution Amendment 5; Hamlin v. United States, 418 U.S. 87, 117 (1974).

The 10th Circuit in United States v. Prentiss, 206 F.3d 960 (2000) reviewed the law in depth relative to the sufficiency of an Indictment failing to allege an essential element of the offense and stated:

> We review a challenge to the sufficiency of an indictment de novo. See United States v. Dashney, 117 F.3d 1197, 1205 (10th Cir. 1997). Rule 7©)(1) of the *Federal Rules of Criminal Procedure* provides "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Under this rule, "[c]onvictions are no longer reversed because of minor technical deficiencies which did not prejudice the accused [and], [t]his has been a statutory development in criminal law." Russell v. United States, 369 U.S. 749, 763 (1962).

---

[2]See 9th Circuit Model Criminal Jury Instruction.

> However, "the substantial safeguards for those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." Id.

Focusing on the issue disputing this case, "[a] criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense." United States v. Gayle, 967 F.2d 483, 485 (11th Cir. 1992)(en banc); United States v. Brown, 995 F.2d 1493, 1505 (10th Cir. 1993). This requirement serves two fundamental functions: ...Second, it fulfills the 5th Amendment's indictment requirement, insuring that a Grand Jury only return an indictment when it finds probable cause to support all of the necessary elements of the crime. Gayle, 967 F.2d at 485. See also United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988).

> [The requirement of the] inclusion of all elements...derives from the 5th Amendment, which requires that the grand jury have considered and found all elements to be present."; United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.)(holding that a sufficient indictment "is of paramount importance" and required ...to avoid [a] conviction on facts not found or perhaps not even presented to, the grand jury that indicted [the defendant].

> The omission of an element is "such a critical omission" that the Federal Rules of Criminal Procedure require it to "be noted by an appellate court sua sponte." Brown,995 F.2d at 1504.

However, even if challenged after verdict, the failure of the indictment to allege all the essential elements of an offense ...is a jurisdictional defect requiring dismissal, despite citation of the underlying statute in the indictment. Id. (citing United States v. Crockett, 812 F.2d 626, 629 and n.3 (10th Cir. 1987). This type of fundamental defect cannot be cured by the absence of prejudice to the defendant or a jury instruction.

As the indictment failed to allege an essential element of the offense, it violated the Defendant's right to be tried upon charges found by a grand jury and which states the full elements of an offence under the applicable statute; therefore this Court should reverse the convictions as to counts 4, 5, 6 and 7 of the indictment.

V. The sentencing in this case violated the holdings of this Court In Blakely v Washington and U.S. v Booker in that the Court Conidered relevant conduct evidence not found by the jury, including that from the dismissed Counts and sentenced Appellants to sentences he felt were mandated by the Federal Sentencing Guidelines

After the trial, sentencing and briefing of this case in the Court of Appeals, the United States Supreme Court case of Blakely v Washington, 2004 WL 1402697 was decided. Subsequently, while this case was pending Certiorari Review, this Court decided the cases of United States v Booker, 543 U.S.__, (January 12, 2005).

This Court, in Blakely v Washington, 2004 WL 1402697,1264 S.Ct. 2531 (2004), decided on June 24, 2004, basically stated that any basis for an increase to a Defendant's sentence that was not supported by a finding of a jury beyond a reasonable doubt is in violation of the Sixth Amendment to the United States Constitution. Booker, supra, extended this holding to Federal sentencing cases and also held that the guidelines for sentencing were only Guidelines, not mandatory sentence requirements.

In the sentencing here, the District Court considered and found evidence of "relevant conduct" that was not proven or found by the jury to the "beyond a reasonable doubt

standard" and also included some proof from the government that came from evidence in Counts of the indictment that were dismissed and not submitted to the jury. In addition, the District Court sentenced Appellants within the Guideline ranges as mandatory ranges rather than advisory.

These matters are first raised here because they were found and developed by this Court while this case was on appeal and after it had been closed to briefing at each prior stage. It is clear from the sentencing that these cases apply, these Appellants were adversely affected, and that there has been no waiver of the rights set out in Booker, supra. For these reasons, the case should be reversed and/or remanded, if not for the prior errors alleged, then for the correction of the sentence and re-sentencing pursuant to this Court's directions.

CONCLUSION

For the above reasons, Petitioner requests this Honorable Court to Accept this case for review and issue the Writ of Certiorari to the Court of Appeals for the Sixth Circuit, granting such additional and further relief to Petitioner as this Court sees Proper.

Respectfully submitted,

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Tenn. Bar No. 2177
Attorney for Petitioners
Franklin Hale and Carolyn Sue Hale
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APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Petition for Rehearing
and Petition for Rehearing En Banc,
filed 01/06/05 ..... A1 - A2

Petition for Rehearing and Petition
for Rehearing En Banc,
filed 11/05/04 ..... B1- B16

Opinion,
filed 10/22/04 ..... C1 - C9

WESTERN DISTRICT OF TENNESSEE FILINGS:

Judgement [Franklin Hale],
filed 03/24/03 ..... D1- D10

Judgement [Carolyn Hale],
filed 03/24/03 ..... E1- E10

OTHER:

U.S. Code: Title 18: Section 371
Conspiracy To Commit Offense
or to Defraud United States ..... F1 - F1

U.S. Code: Title 16: Section 3372
Prohibited Acts ..... G1 - G3

U.S. Code: Title 16: Section 3373
Penalties and Sanctions ..... H1 - H5

APPENDIX A

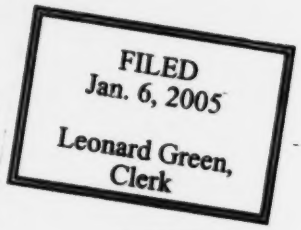
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER, DENYING PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC,
FILED JANUARY 6, 2005

A-1 through A-2

Nos. 05-5508/5509

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
) **ORDER**
)
FRANKLIN HALE AND)
CAROLYN SUE HALE,)
Defendant-Appellant.)

BEFORE: **DAUGHTREY** and **SUTTON**, Circuit Judges; and **COOK**,[1] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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[1]Hon. Julian A, Cook, Jr., Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is **denied**.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

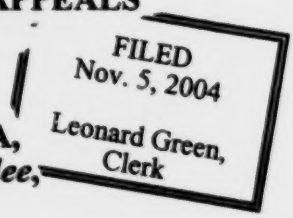
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC,
FILED NOVEMBER 5, 2004

B-1 through B-16

NO. 03-5508, 03-5509

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

FRANKLIN HALE and CAROLYN HALE,
Defendants - Appellants.

On Appeal from the United States District Court
For the Western District of Tennessee
Jackson Division

PETITION FOR REHEARING and PETITION FOR REHEARING EN BANC

Charles P. Dupree
Tenn. Bar No. 2177
Attorney for Appellant
101 Robinson Bldg.
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Chattanooga, Tn 37402
(423) 756-1841

If it pleases this Court:

Defendants Carolyn Hale and Franklin Hale are petitioning this Court for a re-hearing and/or rehearing en banc of the decision in the appeal of this case, which was rendered by the panel on October 22, 2004. The decision is attached as exhibit to this petition.

Petitioners would urge the re-hearing for the following reasons:

I. The Cumulative effect of the errors complained of was illegal and prejudicial.

The brief in this cases cited trial errors and actions that prejudiced the Defendants, running the gammet from allegations that the indictment was not sufficient and complete, to the lack of charge setting out the scienter, or knowledge, requirement, the necessity of the specific identification of the actions complained of as illegal to the falsification of records, to the final effect of the failure of the Court to charge the misdemeanor count of the law that accompanies the felony count charged. The panel found that each defect was not significant to constitute plain or prejudicial error, but did not examine or attempt to review the cumulative effect of the actions that had taken place.

Of course, part of the problem in this case is that the Lacey Act, upon which this prosecution is based, borrows the state law to establish the prohibited acts and the Court is bound by the quality or lack of same of the underlying state law. This does not mean that the court may incorporate only part of the state law or should attempt to "fill in" where the

state law is not understandable or complete. With a full examination of the entire prosecution and the effect ofthe errors and omissions raised in the brief the cumulative effect of all the errors will legally be much greater than the simple analysis and denial of each issue complained of. For this reason, we feel that the matter should be re-heard En Banc to evaluate and review the total effect of all the issues raised on direct appeal and their total effect on the fairness of the trial and the resulting conviction of Petitioners.

II. The hearing panel was incorrect in finding that each error was either waived or not sufficient to constitute prejudicial error that would justify the reversal of the conviction.

In the review of the decision of the panel as attached, the reader will notice that the court has gone to great lengths to both supply necessary elements of offences or find that they were not necessary in order to uphold the conviction.

This was not the most artfully tried case that this court will review.

The review effort, however, will not allow the Court to eliminate elements (proof of knowledge or scienter on the part of Defendant-Petitioners), hold that specificity in the nature of the indictment or proof as to the prohibited acts (the question of whether the law prohibits falsification of records of fish or about the fish or both, which is not clearly set out in the state law which constitutes the basis of the prosecution) is not necessary, or that there is no necessity to charge both misdemeanor and felony offences contained in the same stautory scheme when, as here, they basically track the same elements and are contained in the "borrowed" state law. Not

only did the panel not appreciate the problems caused by these issues, the panel also, as set out above, did not see the total or cumulative prejudice caused and effected by the issues complained of.

III. The issues raised in Blakely v. Washington regarding evidence and sentencing were not heard and should be addressed in this appeal.

Because of the timing of the briefing schedule and argument of this appeal, the decision of the United States Supreme Court in Blakely v Washington, 124 S. Ct. 2531, 159 L.Ed. 403 (U.S. 2004), was announced after briefing and the sentencing and evidentiary issues raised in that case were not presented or argued. As well as the problems of relevant conduct issues in the sentencing, the Blakely case itself can be read to provide Defendants protection from the situation that presented itself here, in that the jury was not presented all the issues and that the decision may or should have been based on illegal or improper information or lack of information. A review of the transcript and the joint appendix shows that the jury had great difficulty reaching a verdict in deliberations and finally was charged by the Court with a modified version of the U.S. v Allen, charge which led to the verdict of conviction. These problems and discrepancies may and should constitute a Sixth amendment violation under Blakely, both in the evidentiary aspects of the guilt and innocence part of the trial, but also in the sentencing of both Petitioner-Defendants and the use of relevant conduct and unproved matters to support the sentence.

Due to the timing of the decision and this case, re-hearing and possibly re-briefing prior to the re-hearing

should be done to deal with the prior and pending issues not addressed or addressed in an incomplete fashion, including those raised by Blakely, supra.

Conclusion

For the reasons set out above, Petitioners request and urge that the decision rendered in this appeal be withdrawn and that a Rehearing and/or a Rehearing En Banc of the argument of this case be set to address the issues presented.

Respectfully submitted,

/s/ Charles P. Dupree
Charles P. Dupree
Counsel for Franklin Hale
and Carolyn Hale
Tenn. Bar No. 2177
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622 Georgia Avenue
Chattanooga, Tn 37402
(423) 756-1841

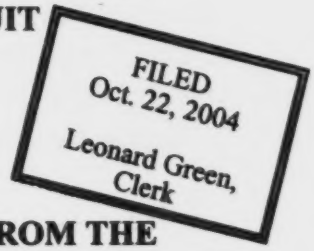
CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2004,1 served a copy of the above Petition for Rehearing and Petition for Rehearing En Banc on Assistant United States Attorney Leigh Grinalds at his address of 3rd Floor, Federal Building 109 S. Highland Ave, Suite 300 Jackson, TN 38301 by United States Mail

Appendix

Judgment of October 22, 2004

NOT RECOMMENDED FOR PUBLICATION
NOS. 03-5508/5509
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
	) **ON APPEAL FROM THE**
	) **UNITED STATES DISTRICT**
v.	) **COURT FOR THE WESTERN**
	) **DISTRICT OF TENNESSEE**
FRANKLIN HALE and CAROLYN SUE HALE, *Defendants-Appellees.*	)

BEFORE: **DAUGHTREY** and **SUTTON**, Circuit Judges, and **COOK,*** District Court Judge.

PER CURIAM. The defendants, Frank and Carolyn Hale, were originally charged in an 11-count indictment with conspiracy to violate and ten substantive violations of the Lacey Act, which makes it a federal crime, under certain circumstances, to violate state fish and wildlife laws. *See* 16 U.S.C. § 3371-3378 (1981). After the government dismissed Counts 8 through 11, the Hales went to trial before a jury and

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*The Hon. Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

were convicted on six of the seven remaining counts. They now appeal, contending that several of the counts on which they were convicted fail to charge an offense and that the jury instructions were faulty in at least two respects. We find no reversible error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Hales, a married couple, owned and operated a wholesale caviar business, Royaloff Caviar, in Tennessee and Kentucky. They utilized the roe of paddlefish (Polyodon spathula), which are large, shark-like river fish with long, flat blade-like snouts. Because paddlefish populations are declining, many states have either limited the season for catching paddlefish or banned fishing for them altogether. The defendants were charged with purchasing and selling the eggs of paddlefish that were caught during the closed season, with falsifying records relating to the caviar, and with operating a wholesale fish business without the requisite state license.

At trial, there was extensive testimony regarding the illegal nature of the defendants' business. Fishermen and their relatives testified that they sold the Hales paddlefish caviar obtained during closed season and that the Hales knew that the fish had been caught illegally. There was also overwhelming evidence that the Hales had purposefully put false names on the records to hide the fact that they were buying the fish eggs illegally. The Hales engaged in other deceptive behavior, such as instructing fishermen to park their cars so that their Tennessee license plates would not show when they were selling paddlefish eggs in Kentucky while the

season was closed in Tennessee. Several fishermen testified that Frank Hale told them that he would 'take care of them" if they were ever caught fishing illegally. Two fishermen testified that the Hales helped them obtain Illinois commercial fishing licenses as a cover-up, in case they were ever stopped transporting eggs while the season was closed in Tennessee. Finally, the evidence showed that the Hales were not licensed with the Tennessee Wildlife Resource Agency, as required by state law, between 1995 and 1998, despite the advice of several state agents who testified that they had informed the Hales of the need to obtain such a commercial license.

Following the jury's verdict acquitting the defendants on one count and convicting them of conspiracy and five substantive violations, the district court sentenced Franklin Hale to 24 months on each of the counts, to run concurrently, and Carolyn Hale to 21 months on each of the counts, to run concurrently. This appeal followed.

DISCUSSION

The Hales were convicted of violating Tennessee fishing and wildlife laws under the Lacey Act, which "assists the states in enforcing their wildlife protection laws by making ita federal crime 'to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State. . . .' 16 U.S.C. § 3372(a)(2)(A) (1981)." *United States v. Bryant*, 716 F.2d 1091, 1093 (6th Cir. 1983).

The defendants argue that count 1 failed to allege a criminal offense because, under Tennessee law, no license was required to operate a wholesale fish dealership prior to

2000. This question was not raised as a challenge to the indictment prior to trial, and it is therefore reviewed on appeal under the standard set out in *United States v. Gatewood*,173 F.3d 983, 986 (6th Cir. 1999) (emphasis added):

> We review the sufficiency of an indictment *de novo*. *See United States v. DeZarn*, 157 F.3d 1042, 1046 (6th Cir. 1998). . . Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, however, a defendant who contends that the indictment fails to establish jurisdiction or to charge an offense may raise that challenge at any time. *See United States v. Hart*, 640 F.2d 856, 857 (6th Cir. 1981). But when an indictment is not challenged until appeal, as in this case, the indictment must be construed liberally in favor of its sufficiency. *See United States v. Gibson*, 513 F.2d 978, 979 (6th Cir. 1975). "Furthermore, unless the defendant can show prejudice, a conviction will not be reversed where the indictment is challenged only after conviction unless the indictment cannot within reason be construed to charge a crime." *Hart*, 640 F.2d at 857-58.

The first count of the indictment charged that the defendants conspired to violate the Lacey Act by operating a wholesale fish dealership without a license, in violation of the following provision of Tennessee Code Annotated §70-2-206 (1990):

> Wholesale fish dealers and boat dock operators *License requirements - Fees* . (a) Before any person, firm or corporation engages in the business of a "wholesale fish dealer" or a "wholesale mussel dealer," as defined in this subsection, such person, firm

or corporation shall make *application* to the state wildlife resources agency upon forms provided by it.

(1) "Person" includes the plural as well as the singular, as the case demands, and includes individuals, partnerships, associations, or corporations;

(2) "Places of business," as used in this title includes the place where orders for aquatic products are received, or where aquatic products are purchased or sold;

(3) "Wholesale fish dealer" means any person in the business of buying for the purpose of selling, canning, preserving or processing, or buying for the purpose of handling for shipment or sale, fish or other edible aquatic life or products, to retailers and/or hotels, restaurants or cafes. *Each separate place of business shall require a separate license...*;

(b) The license and fee to be paid for the same are hereby provided for and are as follows:

(1) Wholesale fish dealer's license .....$ 250.00
(2) Wholesale mussel dealer's license ..$ 250.00

Tenn. Code Ann. §70-2-206 (1990) (emphasis added).

In claiming that Count 1 failed to state an offense, the defendants cite only to subsection (a) of the statute, arguing that prior to its amendment in 2000, the statute required merely an "application," not an actual license. Interpreted as a whole, however, it is clear that § 70-2-206 required a license

for wholesale fish dealers at the time the offense in this case occurred. Although he described the language of the section as "inartful," the district judge so held. Construing the indictment "liberally in favor of sufficiency," we agree with this assessment and therefore find no deficiency with respect to the first count of the indictment.

The defendants also contend that Counts 4, 5, 6, and 7 of the indictment failed to allege an essential element of the offense charged. This assignment of error was likewise not raised in advance of trial, and we find it equally unavailing. Each of those counts alleges that the defendants prepared records falsifying the identity and address of the seller of the paddlefish, in violation of 16 U.S.C. §§ 3372(d)(2) and 3373(d)(3)(A)(ii). Sixteen U.S.C. §3372(d) prohibits the "mak[ingl or [submission of] any false record, account, or label for, or any false identification of any fish, wildlife, or plant which has been, or is intended to be. . . transported in interstate or foreign commerce." The defendants argue that because the indictment did not allege that the allegedly false record involved a false identification of *fish*, it failed to allege an essential element of the offense.

This argument is so obviously without merit that it borders on being frivolous. The statute clearly criminalizes making and submitting false records relating to fish that are sold in interstate commerce. It does not, as the defendants suggest, criminalize only the false identification of fish (i.e., passing off paddlefish caviar as sturgeon caviar). Even without a standard of review that requires us to construe the indictment liberally in favor of sufficiency, we find no legal deficiency in the counts in question.

We turn, then, to the defendant's challenges to the jury instructions, reviewing the failure of the district court to give

special instructions to the jury for plain error only, because the defendant made no contemporaneous objections to the instructions. *See United States v. Dedhia*, 134 F.3d 802, 808 (6th Cir. 1998).

The defendants argue that the district court plainly erred because it did not instruct the jury that the Lacey Act required specific knowledge, i.e., that the defendants knew that their actions were in violation of the underlying statutes. Instead, the district court instructed the jury that "knowingly' means to act voluntarily and deliberately rather than mistakenly or inadvertently." This instruction is not only consistent with the language of the statute but also with the legislative history of the Lacey Act, which indicates that the government's burden is to show that a defendant had knowledge that his or her conduct was illegal, not actual knowledge of the exact underlying statutes that were violated. In this regard, the Senate report describes "knowing violations" of the Lacey Act as those "violations that are committed by engaging in volitional conduct." S.REP. No. 97-123, at 11 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1758.

The failure to give a special instruction in this case was not error because implicit in the court's charge was a requirement that the government prove that the defendants knew they were violating state law. Moreover, any failure to give a special instruction in this case could not have affected the defendants' substantial rights or the fairness, integrity, or public reputation of the trial, given the overwhelming evidence of the defendants' guilt. *See Dedhia*, 134 F.3d at 808.

The defendants also argue for the first time on appeal that the district court should have instructed the jury on a

lesser-included misdemeanor offense. Under *United Statesv. Camejo*, 333 F.3d 669, 673 (6th Cir. 2003), such an instruction is required only if:

> (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

In this case, the jury was instructed on the felony offense set out in 16 U.S.C. § 3373(d)(1)(B), which prohibits "the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350, knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation." Citing *United States v. Parker*, 991 F.2d 1493, 1496 (9th Cir. 1993), the defendants contend that the jury should also have been instructed on the lesser-included misdemeanor charge, which prohibits non-commercial violations of the Lacey Act. *See* 16 U.S.C. § 3373(d)(2).

We disagree. First, there was no request for such an instruction. More importantly, because there was overwhelming evidence at trial on which the jury could have convicted the defendants of the felony offense under §3373(d)(1)(B), an instruction on the misdemeanor offense was not required. Certainly, we cannot say that it was plain

error not to include an instruction on the lesser included offense sua sponte.

CONCLUSION

For the reasons set out above, we find no reversible error and **AFFIRM** the judgment of the district court.

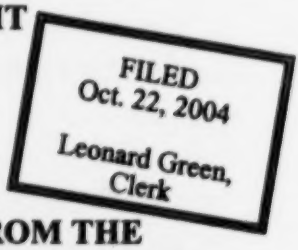
APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION, FILED OCTOBER 22, 2004

C-1 through C-9

NOT RECOMMENDED FOR PUBLICATION
NOS. 03-5508/5509
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
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	) **UNITED STATES DISTRICT**
V.	) **COURT FOR THE WESTERN**
	) **DISTRICT OF TENNESSEE**
FRANKLIN HALE and CAROLYN SUE HALE, *Defendants-Appellees,*	)

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The Hales were convicted of violating Tennessee fishing and wildlife laws under the Lacey Act, which "assists the states in enforcing their wildlife protection laws by making ita federal crime 'to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State. . .' 16 U.S.C. § 3372(a)(2)(A) (1981)." *United States v. Bryant*, 716 F.2d 1091, 1093 (6th Cir. 1983).

The defendants argue that count 1 failed to allege a criminal offense because, under Tennessee law, no license

was required to operate a wholesale fish dealership prior to 2000. This question was not raised as a challenge to the indictment prior to trial, and it is therefore reviewed on appeal under the standard set out in *United States v. Gatewood*,173 F.3d 983, 986 (6th Cir. 1999) (emphasis added):

> We review the sufficiency of an indictment *de novo*. *See United States v. DeZarn*, 157 F.3d 1042, 1046 (6th Cir. 1998). . . Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, however, a defendant who contends that the indictment fails to establish jurisdiction or to charge an offense may raise that challenge at any time. *See United States v. Hart*, 640 F.2d 856, 857 (6th Cir. 1981). But when an indictment is not challenged until appeal, as in this case, the indictment must be construed liberally in favor of its sufficiency. *See United States v. Gibson*, 513 F.2d 978, 979 (6th Cir. 1975). "Furthermore, unless the defendant can show prejudice, a conviction will not be reversed where the indictment is challenged only after conviction unless the indictment cannot within reason be construed to charge a crime." *Hart*, 640 F.2d at 857-58.

The first count of the indictment charged that the defendants conspired to violate the Lacey Act by operating a wholesale fish dealership without a license, in violation of the following provision of Tennessee Code Annotated §70-2-206 (1990):

> Wholesale fish dealers and boat dock operators - *License requirements - Fees.* (a) Before any person, firm or corporation engages in the business of a "wholesale fish

dealer" or a "wholesale mussel dealer," as defined in this subsection, such person, firm or corporation shall make *application* to the state wildlife resources agency upon forms provided by it.

(1) "Person" includes the plural as well as the singular, as the case demands, and includes individuals, partnerships, associations, or corporations;

(2) "Places of business," as used in this title includes the place where orders for aquatic products are received, or where aquatic products are purchased or sold;

(3) "Wholesale fish dealer" means any person in the business of buying for the purpose of selling, canning, preserving or processing, or buying for the purpose of handling for shipment or sale, fish or other edible aquatic life or products, to retailers and/or hotels, restaurants or cafes. *Each separate place of business shall require a separate license...*;

(b) The license and fee to be paid for the same are hereby provided for and are as follows:

(1) Wholesale fish dealer's license .....$ 250.00
(2) Wholesale mussel dealer's license ..$ 250.00

Tenn. Code Ann. §70-2-206 (1990) (emphasis added).

In claiming that Count 1 failed to state an offense, the defendants cite only to subsection (a) of the statute, arguing that prior to its amendment in 2000, the statute required

merely an "application," not an actual license. Interpreted as a whole, however, it is clear that § 70-2-206 required a license for wholesale fish dealers at the time the offense in this case occurred. Although he described the language of the section as "inartful," the district judge so held. Construing the indictment "liberally in favor of sufficiency," we agree with this assessment and therefore find no deficiency with respect to the first count of the indictment.

The defendants also contend that Counts 4, 5, 6, and 7 of the indictment failed to allege an essential element of the offense charged. This assignment of error was likewise not raised in advance of trial, and we find it equally unavailing. Each of those counts alleges that the defendants prepared records falsifying the identity and address of the seller of the paddlefish, in violation of 16 U.S.C. §§ 3372(d)(2) and 3373(d)(3)(A)(ii). Sixteen U.S.C. §3372(d) prohibits the "mak[ingl or [submission of] any false record, account, or label for, or any false identification of any fish, wildlife, or plant which has been, or is intended to be. . . transported in interstate or foreign commerce." The defendants argue that because the indictment did not allege that the allegedly false record involved a false identification of *fish*, it failed to allege an essential element of the offense.

This argument is so obviously without merit that it borders on being frivolous. The statute clearly criminalizes making and submitting false records relating to fish that are sold in interstate commerce. It does not, as the defendants suggest, criminalize only the false identification of fish (i.e., passing off paddlefish caviar as sturgeon caviar). Even without a standard of review that requires us to construe the indictment liberally in favor of sufficiency, we find no legal deficiency in the counts in question.

We turn, then, to the defendant's challenges to the jury instructions, reviewing the failure of the district court to give special instructions to the jury for plain error only, because the defendant made no contemporaneous objections to the instructions. *See United States v. Dedhia*, 134 F.3d 802, 808 (6th Cir. 1998).

The defendants argue that the district court plainly erred because it did not instruct the jury that the Lacey Act required specific knowledge, i.e., that the defendants knew that their actions were in violation of the underlying statutes. Instead, the district court instructed the jury that "knowingly' means to act voluntarily and deliberately rather than mistakenly or inadvertently." This instruction is not only consistent with the language of the statute but also with the legislative history of the Lacey Act, which indicates that the government's burden is to show that a defendant had knowledge that his or her conduct was illegal, not actual knowledge of the exact underlying statutes that were violated. In this regard, the Senate report describes "knowing violations" of the Lacey Act as those "violations that are committed by engaging in volitional conduct." S.REP. No. 97-123, at 11 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1758.

The failure to give a special instruction in this case was not error because implicit in the court's charge was a requirement that the government prove that the defendants knew they were violating state law. Moreover, any failure to give a special instruction in this case could not have affected the defendants' substantial rights or the fairness, integrity, or public reputation of the trial, given the overwhelming evidence of the defendants' guilt. *See Dedhia*, 134 F.3d at 808.

The defendants also argue for the first time on appeal that the district court should have instructed the jury on a lesser-included misdemeanor offense. Under *United Statesv. Camejo*, 333 F.3d 669, 673 (6th Cir. 2003), such an instruction is required only if:

> (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

In this case, the jury was instructed on the felony offense set out in 16 U.S.C. § 3373(d)(1)(B), which prohibits "the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350, knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation." Citing *United States v. Parker*, 991 F.2d 1493, 1496 (9th Cir. 1993), the defendants contend that the jury should also have been instructed on the lesser-included misdemeanor charge, which prohibits non-commercial violations of the Lacey Act. *See* 16 U.S.C. § 3373(d)(2).

We disagree. First, there was no request for such an instruction. More importantly, because there was overwhelming evidence at trial on which the jury could have convicted the defendants of the felony offense under §3373(d)(1)(B), an instruction on the misdemeanor offense

was not required. Certainly, we cannot say that it was plain error not to include an instruction on the lesser included offense sua sponte.

CONCLUSION

For the reasons set out above, we find no reversible error and **AFFIRM** the judgment of the district court.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

JUDGMENT [FRANKLIN HALE],
FILED MARCH 24, 2003

D-1 through D-10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA

-v- **01-10061-1-T**

FILED
March 24, 2003
Western District
of Tennessee

FRANKLIN HALE

Louis R. Lucas. Retained
Defense Attorney
100 North Main Building,
Suite 3002
Memphis, TN 38103

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty on Count S1, S3, S4, S5, S6 and S7 of the Superseding Indictment on May 16, 2002. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count #(s)
18 USC §371	Conspiracy to Violate the Lacey Act	12/26/99	S1

16 USC § 3372(a)(2)(A) and 3373(d)(1)(B)	Purchase and Sale of Any Fish or Wildlife in Interstate Commerce Take, Possessed or Transported in Violation of any State Law	05/07/97	S3
16 USC § 3372(d)(2) and 3373(d)(3)(A)(ii)	Illegal Purchase and Sale of wildlife With a Market Value in Excess of $350.00; Making a False Record in a Wildlife Transaction Knowing that Said Wildlife had been Purchased and Received in Interstate Commerce	03/12/97	S4 and S5

16 USC § 3372(d)(2) and 3373(d)(3)(A)(ii)	Illegal Purchase and Sale of wildlife With a Market Value in Excess of $350.00; Making a False Record in a Wildlife Transaction Knowing that Said Wildlife had been Purchased and Received in Interstate Commerce	05/07/97	S6 and S7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996

The defendant has been found not guilty on count(s) S2. Count(s) S8, S9, S10 and S11 dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 415-58-9349
Defendant's Date of Birth: 06/09/1939
Deft's U.S. Marshal No.: 17729-076
Date of Imposition of Sentence: March 21, 2003

Defendant's Mailing Address:
50 Pilgrim's Rest Road
Savannah, TN 38372

/s/ James D. Todd
JAMES D. TODD
CHIEF UNITED STATES DISTRICT JUDGE

March 24th, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **24 Months** on each of Counts S1, S3, S4, S5, S6 and S7, to run concurrently.

The Court recommends to the Bureau of Prisons: FPC, Millington as place for service of sentence.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the U.S. District Court Clerks Office in the Order to Surrender.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to_____ at _____ _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts S1, S3, S4, S5, S6 and S7, to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probaUon officer and shall

submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

5. the defendant shall notify the probation officer **ten (1O) days prior** to any change in residence or employment;

6. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic uninalysis tests as directed by the probation officer to determine the use of any controlled substance;

7. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

8. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

9. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

10. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a Law enforcement officer;

11. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

12. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall provide the Probation Officer access to any requested financial information and permit full financial disclosure.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$600.00	$25,000.00	

The Special Assessment shall be due immediately.

FINE

A Fine in the amount of $ 25,000.00 is imposed and shall be due immediately.

RESTITUTION

No Restitution was ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

JUDGMENT [CAROLYN HALE],
FILED MARCH 24, 2003

E-1 through E-10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA

FILED
March 24, 2003
01-10061-1-T Western District of Tennessee

-v-

CAROLYN SUE HALE

Louis R. Lucas. Retained
Defense Attorney
100 North Main Building,
Suite 3002
Memphis, TN 38103

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty on Count S1, S3, S4, S5, S6 and S7 of the Superseding Indictment on May 16, 2002. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count #(s)
18 USC §371	Conspiracy to Violate the Lacey Act	12/26/99	S1

16 USC § 3372(a)(2)(A) and 3373(d)(1)(B)	Purchase and Sale of Any Fish or Wildlife in Interstate Commerce Take, Possessed or Transported in Violation of any State Law	05/07/97	S3
16 USC § 3372(d)(2) and 3373(d)(3)(A)(ii)	Illegal Purchase and Sale of wildlife With a Market Value in Excess of $350.00; Making a False Record in a Wildlife Transaction Knowing that Said Wildlife had been Purchased and Received in Interstate Commerce	03/12/97	S4 and S5

16 USC § 3372(d)(2) and 3373(d)(3)(A)(ii)	Illegal Purchase and Sale of wildlife With a Market Value in Excess of $350.00; Making a False Record in a Wildlife Transaction Knowing that Said Wildlife had been Purchased and Received in Interstate Commerce	05/07/97	S6 and S7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996

The defendant has been found not guilty on count(s) S2. Count(s) S8, S9, S10 and S11 dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 412-02-7618
Defendant's Date of Birth: 02/13/1957
Deft's U.S. Marshal No.: 17728-076
Date of Imposition of Sentence: March 21, 2003

Defendant's Mailing Address:
50 Pilgrim's Rest Road
Savannah, TN 38372

/s/ James D. Todd
JAMES D. TODD
CHIEF UNITED STATES DISTRICT JUDGE

March 24th, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **24 Months** on each of Counts S1, S3, S4, S5, S6 and S7, to run concurrently.

The Court recommends to the Bureau of Prisons: FPC, Millington as place for service of sentence.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the U.S. District Court Clerks Office in the Order to Surrender.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to_____.
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** on each of Counts S1, S3, S4, S5, S6 and S7, to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probaUon officer and shall

submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

5. the defendant shall notify the probation officer **ten (1O) days prior** to any change in residence or employment;

6. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic uninalysis tests as directed by the probation officer to determine the use of any controlled substance;

7. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

8. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

9. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

10. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a Law enforcement officer;

11. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

12. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall provide the Probation Officer access to any requested financial information and permit full financial disclosure.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$600.00	$25,000.00	

The Special Assessment shall be due immediately.

FINE

A Fine in the amount of $ 25,000.00 is imposed and shall be due immediately.

RESTITUTION

No Restitution was ordered.

APPENDIX F

U.S. CODE: TITLE 18: SECTION 371
CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

F-1 through F-1

Laws:
Cases and Codes:
U.S. Code: Title 18: Section 371

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX G

U.S. CODE: TITLE 16: SECTION 3372
PROHIBITED ACTS

G-1 through G-3

Laws:
Cases and Codes:
U.S. Code: Title 16: Section 3372

Section 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person —

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce —

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18) —

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;[1]

(4) to attempt to commit any act described in paragraphs (1) through (4).[2]

(b) Marking offenses

It is unlawful for any person to import, export, or transport in commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.

(c) Sale and purchase of guiding and outfitting services and invalid licenses and permits

(1) Sale

It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide —

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit; for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

---

[1]So in original. Probably should be followed by "or".

[2]So in original. Probably should refer to pars. (1) through (3).

(2) Purchase

It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration —

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit; for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(d) False labeling offenses

It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be -

(1) imported, exported, transported, sold, purchased, or received from any foreign country;

(2) transported in interstate or foreign commerce.

APPENDIX H

U.S. CODE: TITLE 16: SECTION 3373
PENALTIES AND SANCTIONS

H-1 through H-5

Laws:
Cases and Codes:
U.S. Code: Title 16: Section 3373

Section 3373. Penalties and sanctions

(a) Civil penalties

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, and any person who knowingly violates section 3372(d) of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation: Provided, That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or $10,000, whichever is less.

(2) Any person who violates section 3372(b) of this title may be assessed a civil penalty by the Secretary of not more than $250.

(3) For purposes of paragraphs (1) and (2), any reference to a provision of this chapter or to a section of this chapter shall be treated as including any regulation issued to carry out any such provision or section.

(4) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of the said fish or wildlife or plants.

(5) Any civil penalty assessed under this subsection may be-remitted or mitigated by-the Secretary.

(6) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the Secretary shall take into, account the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, ability to pay, and such other matters as justice may require.

(b) Hearings

Hearings held during proceedings for the assessment of civil penalties shall be conducted in accordance with section 554 of title 5. The administrative law judge may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the

administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(c) Review of civil penalty

Any person against whom a civil penalty is assessed under this section may obtain review thereof in the appropriate District Court of the United States by filing a complaint in such court within 30 days after the date of such order and by simultaneously serving a copy of the complaint by certified mail on the Secretary, the Attorney General, and the appropriate United States attorney. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of title 28. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo.

(d) Criminal penalties

(1) Any person who -

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350, knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall he fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(3) Any person who knowingly violates section 3372(d) of this title —

(A) shall be fined under title 18 or imprisoned for not more than 5 years, or both, if the offense involves —

(i) the importation or exportation of fish or wildlife or plants; or

(ii) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants with a market value greater than $350; and

(B) shall be fined under title 18 or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A)

(e) Permit sanctions

The Secretary may also suspend, modify, or cancel any Federal hunting or fishing license, permit, or stamp, or any license or permit authorizing a person to import or export fish or wildlife or plants (other than a permit or license issued pursuant to the Magnuson—Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)), or to operate a quarantine station or rescue center for imported wildlife or plants, issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation issued hereunder. The Secretary shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any licenses, permits, stamps, or other agreements pursuant to this section.

(2)

Supreme Court, U.S.
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No. 04-1362

In the Supreme Court of the United States

FRANKLIN HALE AND KATHLEEN HALE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of

the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

MAY 2005

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* The government waives any further response to the petition unless the Court requests otherwise.